



2025 M Street, NW
Suite 800
Washington, DC 20036

p: 202.367.1163
f: 202.367.2163
www.nafoalliance.org

Submitted via www.regulations.gov and Federal Express
Director of Conservation and Environmental Programs Division
Farm Service Agency
United States Department of Agriculture
Stop 0513
1400 Independence Avenue, SW
Washington, DC 20250-0513

**Re: Biomass Crop Assistance Program; Proposed Rule
75 Fed. Reg. 6264 (Feb. 8, 2010)**

To Whom It May Concern:

The National Alliance of Forest Owners (“NAFO”) submits the following comments in response to the United States Department of Agriculture’s (“USDA”) proposed regulations to implement the Biomass Crop Assistance Program (“BCAP”) authorized by the Food, Conservation, and Energy Act of 2008 (“2008 Farm Bill”). 75 Fed. Reg. 6264 (Feb. 8, 2010).

NAFO strongly supports the BCAP program’s goal of promoting the development of renewable energy sources by assisting forest land owners with the production of renewable biomass feedstock and supporting the collection, harvest, storage and transportation (“CHST”) of forest-derived biomass to conversion facilities producing renewable energy. NAFO believes that promoting this critical part of the supply chain will help produce a biomass supply to meet the needs of a growing renewable energy sector and will lead to improvements in infrastructure necessary to efficiently move biomass material from the forest to biomass conversion facilities. In turn, the program will be able to increase the nation’s renewable energy capability over the long-term and satisfy existing and potential future renewable energy mandates. Below, NAFO respectfully recommends certain improvements to the proposed BCAP regulations that will help further realize the goals for the program and for the nation’s renewable energy agenda. These recommendations will assist USDA in finalizing a program that maintains a level playing field for all potential sources of biomass and takes full

opportunity of the multifaceted advantages provided by utilizing renewable forest biomass.

NAFO's mission is to protect and enhance the economic and environmental values of private forests through targeted policy advocacy at the national level. At the time of this submission, NAFO's members represent 75 million acres of private forests in 47 states. NAFO was incorporated in March 2008 and has been working aggressively since to sustain the ecological, economic, and social values of forests and to assure an abundance of healthy and productive forest resources for present and future generations. NAFO's members are the nation's leaders in sustainable forest stewardship and the leading experts on that part of the forest products supply chain nearest to the forest. For this reason, NAFO is uniquely positioned to provide insight into how the BCAP program can effectively utilize forest biomass to develop and strengthen the biomass renewable energy sector.

NAFO members recognize the fundamental role they play in achieving the nation's renewable energy goals. NAFO members are capable of generating large quantities of forest-derived biomass for use in biomass conversion facilities and growing trees, woody crops, and other plants qualifying as eligible materials in BCAP project areas. NAFO's members thus are poised to be important participants and stakeholders in BCAP and significant suppliers of the biomass our nation will need to realize its renewable energy potential. In addition, because forest biomass is recognized in the prevailing science as a carbon neutral energy source, the contributions of NAFO members to achieving national renewable energy objectives will also help address the nation's climate change priorities.

Summary

NAFO's comments are divided into four sections. First we provide background on the fundamental role of forests in achieving the goal of low-carbon renewable energy.

Second, we encourage USDA to construct the BCAP program in a manner that advances the program's goals of helping to build and strengthen the infrastructure necessary for forest-derived biomass to fully contribute toward meeting renewable energy mandates and objectives.

Third, we provide specific recommendations for improving the CHST program to better achieve its goals. We urge USDA to adhere to the broad definition of biomass contained in the statutory language. We also urge that USDA qualify an appropriate

range of available forest-derived biomass materials as eligible materials under the program. In addition, we recommend that USDA take certain steps to ensure fair treatment of all program participants, including early actors, and to respond to practical “on-the-ground” challenges of implementing the program.

Fourth, to improve the crop assistance portion of BCAP, NAFO recommends that the definition of “eligible land” be amended so that certain private landowners are not arbitrarily excluded from participating in the program.

I. Forests Play a Critical Role in Achieving the Goal of Low Carbon Energy

At the outset, NAFO believes BCAP can provide a critical and necessary tool in achieving the nation’s low carbon renewable energy objectives. Forests can provide ample, sustainable, domestic supplies of biomass to produce low-carbon liquid transportation fuels, low-carbon sourced electricity, efficient low-carbon combined heat and power for manufacturing and other industrial uses, and ultra-low-carbon synthetic natural gas that can be substituted for higher carbon sources of electricity and fuels.

A. Forest Biomass Yields Significant Lifecycle GHG Reductions

Using forest biomass to produce liquid fuels, electricity, thermal energy and synthetic gases has significant carbon benefits. In evaluating the GHG emissions associated with fuels, a lifecycle analysis (“LCA”) incorporates all steps in a “product system” to evaluate broader environmental impacts of products and processes. For example, the EPA, in its final rulemaking adopting changes to the Renewable Fuel Standard Program, recognized the GHG emissions reductions of greater than 60% that would result from the use of cellulosic biofuels compared to petroleum. Using the “displacement index” approach, EPA determined that every BTU of gasoline replaced by cellulosic ethanol will produce lifecycle GHG emission reductions of 92.7 percent. See EPA, EPA420-D-06-008, *Renewable Fuel Standard Program: Draft Regulatory Impact Analysis* at 191 (September 2006).

B. The Combustion of Forest Biomass Is Carbon Neutral

Prevailing science acknowledges the significant carbon benefits of electrical and thermal energy produced using renewable biomass from managed forests, and there has long been a consensus that wood and wood residues used to produce such energy in the United States have a neutral effect on atmospheric carbon. The international greenhouse gas accounting methods developed by the Intergovernmental Panel on Climate Change (“IPCC”) and the domestic greenhouse gas reporting program

administered by the Energy Information Administration, for example, recognize that “biogenic” carbon such as the carbon contained in wood and wood residues, is part of the natural carbon balance and will not add to atmospheric concentrations of carbon dioxide. The EPA has also concluded that there is “scientific consensus’... that the carbon dioxide emitted from burning biomass will not increase CO₂ in the air if it is done on a sustainable basis.”¹

C. The Benefits of Utilizing Forest Biomass Have Been Demonstrated

Recent studies have documented the GHG benefits of electricity produced from forest biomass. One study² released by the Green Power Institute, which is the renewable energy program of the Pacific Institute, has found that biomass energy production in California over the last 30 years has provided two kinds of greenhouse gas benefits. First, it has avoided the GHG emissions associated with the production of fossil fuels. Second, biomass energy production has avoided the biogenic greenhouse gas emissions (mainly methane) of the various alternative disposal fates of biomass residues, replacing them with the lower potency greenhouse gas emissions of energy production. As the study observes:

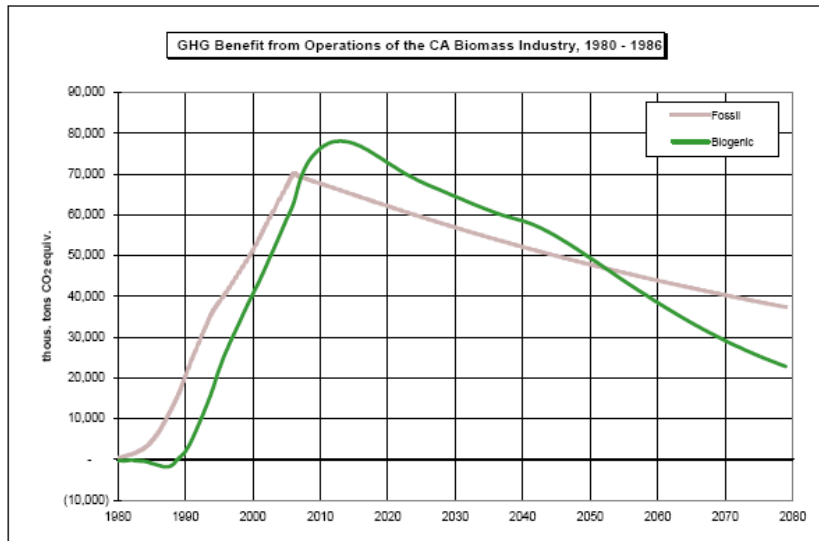
The modern California biomass power industry has operated for almost 30 years. The figure below shows the cumulative greenhouse-gas benefits that have already been provided by the California biomass power industry since its inception through 2006. The chart does not show 2007 or later operations of the industry, which are additive to the curves in the figure. Atmospheric greenhouse-gas levels in 2006 were lower by 70 million tons of CO₂ equiv. of fossil greenhouse gases and by 62.5 million tons of CO₂ equiv. of biogenic greenhouse gases as a result of solid-fuel biomass power production in California during 1980-2006. The greenhouse-gas reductions already in the books will continue to provide benefits well into the future.”³

¹Environmental Protection Agency Combined Heat and Power Partnership, *Biomass Combined Heat and Power Catalog of Technologies*, 96 (Sept. 2007), available at www.epa.gov/chp/documents/biomass_chp_catalog.pdf.

² Gregory Morris, Ph.D. *Bioenergy and Greenhouse Gasses* (2008).

³ *Id.* at 4.

GHG Benefit from Operations of the CA Biomass Industry



President Obama recently emphasized that renewable energy derived from feedstocks such as forest biomass hold the key to transitioning the nation to a “sustainable, low carbon energy future,” and that it is necessary to remove “artificial barriers to market expansion” for advanced biofuels. Letter from President Barack Obama to Governors John Hoeven and Chet Culver (May 27, 2009). As stated by the President:

In the Nation’s ongoing efforts to achieve energy independence, biomass and biofuels promise to play a key role by providing the Nation with homegrown sustainable energy options and energizing our economy with new industries and jobs.

President Barack Obama, *Memorandum for the Secretary of Agriculture, the Secretary of Energy, and the Administrator of the Environmental Protection Agency*, 74 Fed. Reg. 21531-32 (May 5, 2009). BCAP provides one essential mechanism of achieving these renewable energy policy objectives.

D. Forest Biomass Can Be Produced In A Sustainable And Environmentally Responsible Manner.

NAFO's members are committed to sustaining ecological, economic and social values over the long term by acting responsibly to assure an abundance of healthy and productive forest resources for present and future generations. Private forest landowners demonstrate sustainable forest management through a variety of established methods, including reforestation of harvested sites to maintain the forest cycle and use of best management practices ("BMPs") defined through voluntary and regulatory forestry programs and forest certification standards. See NAFO, *NAFO Advocacy Position on Sustainability*, available at www.nafoalliance.org/sustainability-advocacy-position.

Sustainable forest management is also achieved through private forest landowner's compliance with the existing laws governing forest practices and environmental quality. Private forestry operations are regulated by a fairly complex set of laws, regulations and non-regulatory policies at the federal, state and local level. See NAFO, *Environmental Regulation of Private Forests in the U.S.*, available at <http://nafoalliance.org/environmental-regulation-of-private-forests/>. There is considerable evidence that this complex framework of regulatory and non-regulatory requirements has substantially reduced adverse environmental impacts from forestry, and will continue to do so in the future. See *id.* Because working forests are an important potential source of renewable biomass, some have expressed concerns that increased demand for biomass might result in adverse environmental effects. However, while it is difficult to speculate beyond broad generalizations, the removal of additional biomass from working forests is not likely to have negative environmental impacts and, in many instances, will be beneficial. See *id.* A robust yet flexible array of tools, in the form of federal, state and local laws, regulations, programs and BMPs have measurably improved the environmental performance of forest operations in the United States, and can be expected to continue to do so going forward.

II. NAFO Supports Administering BCAP In A Manner That Brings Maturity To Markets For Forest Biomass By Building The Infrastructure Necessary To Capture The Full Benefit Of This Renewable Energy Source.

BCAP reflects Congressional intent to promote the domestic use of renewable bio-energy and, in turn, realize the United States' energy security and independence goals. NAFO members support the BCAP program as a means of facilitating vital

markets for renewable energy and enhancing our forests' contributions to meeting our nation's renewable energy and climate change objectives.

The intent of BCAP is to: (1) ensure an adequate biomass supply necessary to make advances in renewable energy; and (2) move material from the forest and develop the infrastructure in the supply chain supporting renewable energy. See 7 U.S.C. § 8111(b)(1)-(2) (describing the purposes of BCAP). NAFO supports BCAP's ultimate goal of developing the infrastructure and jobs necessary to enable the forest biomass supply chain to efficiently move forest biomass to biomass conversion facilities. In order to achieve the intended purposes of the BCAP program, NAFO recommends that USDA take steps to support this critical part of the supply chain and to ensure that funding for this part of the program is maintained.

The forest biomass supply chain is relatively immature and fragmented compared to its potential. Forest biomass tends to be material that cannot be processed into merchantable logs and therefore must be collected from the woods. This material tends to be very heterogeneous, consisting of branches, defective or broken logs, tops, and inferior trees. Therefore, it is difficult and expensive to collect. In addition, it will generally need to be processed for the conversion facility by grinding or chipping. Historically, there have been limited market opportunities for forest-derived biomass. As a result, there has not been formal operations investment and research, which has caused supply chain development to advance extremely slowly. BCAP's investment in the biomass supply chain is thus critically needed and will help establish the infrastructure and associated jobs that will enable the biomass supply chain to mature and support the growing renewable energy sector.

NAFO members that participated in the 2009 CHST Matching Payment Program report that the program has in many instances helped accelerate the development of critical infrastructure and jobs in the biomass supply chain, thereby improving the ability of eligible material owners to produce and deliver forest biomass to conversion facilities. Based on these experiences, we find that by focusing on the portion of the supply chain nearest to the forest, CHST and crop assistance matching payments will achieve the purposes of the BCAP program and thereby make a valuable contribution to national renewable energy objectives. The manner by which USDA finalizes and implements the BCAP regulations will be critical to whether these goals ultimately are achieved.

III. USDA Should Ensure That Key Provisions Are Included In the Final Rule To Enable The CHST Program To Achieve BCAP's Goals of Improving the Forest Biomass Supply Chain.

Our recommendations for improving the CHST portion of the BCAP program are focused on four general areas: (1) adhering to a broad definition of renewable biomass; (2) ensuring that an appropriate range of forest-derived biomass is eligible under the program; (3) maintaining the proposed requirements with respect to conservation plans, forest stewardship plans, or equivalent plans; and (4) guaranteeing fair treatment of applicants, in both the existing and prospective CHST program.

A. BCAP Should Adhere To The Broad Definition Of Biomass In The 2008 Farm Bill.

BCAP's goals, as directed by Congress and supported by President Obama's policy statement described above, warrant a program that ensures the fullest potential opportunities for forest-derived biomass. To accomplish the program's renewable energy objectives, the program must adhere to a broad definition of renewable biomass contained in the 2008 Farm Bill. Thus, USDA in the BCAP regulations should not further restrict forest-derived materials that qualify as renewable biomass under the statute.

Under the proposed rule, "vegetative wastes, such as wood waste and wood residues, collected or harvested from both public and private lands [would] be limited to only those that would **not otherwise be used for a higher-value product.**" 75 Fed. Reg. at 6266 (emphasis added). USDA explains that applying the "higher-value" restriction to both public and private lands is intended "to achieve better consistency between the requirements for eligible materials collected and harvested from public and private lands." 75 Fed. Reg. at 6266. However, such "consistency" is directly contrary to statutory language and Congressional intent which explicitly applies the restriction only to public, not private, lands. Ultimately, as explained below, the language enacted by Congress must control.

In defining the materials qualifying as renewable biomass from private forests and lands, Congress intentionally and explicitly did not include the "higher-value" restriction applied to federal lands. As specified in the 2008 Farm Bill, renewable biomass for *public lands* is defined, in part, as "materials, pre-commercial thinnings, or invasive species from National Forest System land and public lands . . . that . . . would not otherwise be used for higher-value products." 2008 Farm Bill, Pub. L. 110-234, 122 Stat. 923, at Sec. 9001(12)(A) (May 22, 2008). Regarding *private forests*, renewable

biomass includes “any organic matter that is available on a renewable or recurring basis from non-Federal land or land belonging to an Indian or Indian Tribe that is held in trust by the United States or subject to a restriction against alienation imposed by the United States.” *Id.* at Sec. 9001(12)(B). Thus, Congress intended the “higher-value” requirement to apply only to public, not private, lands.

Because of this clear Congressional direction, USDA’s proposal to include the “higher-value” restriction for private lands should be eliminated in the final rulemaking. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U.S. 16, 23 (1983) (citing *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). When Congress included the restriction for federal lands, “it knew how to do so and did so expressly,” and yet there is no such restriction for non-federal lands. *Cf. Olmsted v. Pruco Life Ins. Co. of New Jersey*, 283 F.3d 429, 433 (2nd Cir. 2002) (concluding that “Congress’s explicit provision of a private right of action to enforce one section of a statute suggests that omission of an explicit private right to enforce other sections was intentional.”). Therefore, the difference between the two sections demonstrates that Congress did not intend for the “higher-value” restriction to apply to non-federal lands. The final rule should be amended accordingly.

NAFO specifically recommends that in the final rule, the definition of “renewable biomass” be amended to conform to the 2008 Farm Bill by deleting the phrase “that would not otherwise be used for higher value products” in proposed section (2)(ii)(B) of that definition. See 75 Fed. Reg. at 6282. If USDA determines that there is a specific activity or component of the supply chain that should be excluded from the CHST program because a matching payment would not help improve the supply chain, NAFO recommends that USDA specify that it is not authorized for matching payments in the definition of “eligible material,” as was done for other eligible material. See 75 Fed. Reg. at 6284 (proposed 7 C.F.R. § 1450.103(c)). In this way, BCAP can remain focused on improving the biomass supply chain without changing the Farm Bill definition of renewable biomass.

NAFO is aware of concerns regarding the potential impact of the BCAP program on the use of certain mill residuals in existing value-added manufacturing processes. These concerns can be addressed consistent with the intent of Congress by focusing implementation of the CHST program on its intended purpose—to help establish the infrastructure, jobs and associated operations in the portion of the biomass supply chain that moves forest-derived biomass to conversion facilities. Focusing the implementation

of the BCAP program in this manner will address many, and perhaps most, of the concerns raised thus far.

B. CHST Should Qualify The Full Range of Forest-Derived Biomass As Eligible Material.

Forest-derived biomass is collected and processed in various ways. Because of these variations, the BCAP program should make certain that all types of forest-derived biomass are qualified as eligible material regardless of the methods utilized for their collection, harvest, and processing. This includes qualifying trees, slash, chips, bark, hog fuel, understory and purpose grown material, and disaster debris removed from the forest as eligible material.

There are both dispersed (“in-woods”) and centralized approaches to processing forest-derived biomass. Forest-derived biomass used for energy production at a biomass conversion facility can be delivered either directly from the forestry operation or from an intermediate site. Because we are in the early stages of developing the biomass supply chain, operators need flexibility to determine the most cost effective set of transportation and processing logistics, which may include the development of new infrastructure as well as the use of existing infrastructure. Some infrastructure may be located in remote rural areas, while other infrastructure may be located near transportation corridors and conversion facilities. Although the proposed rule does not appear to differentiate between the types or location of infrastructure used to process forest-derived biomass, the final rule should support the development and utilization of all infrastructure currently existing or developed to implement the program. Such an approach will foster innovation and efficiency in the supply chain associated with forest-derived biomass. As stated below, this will also require that the CHST program not differentiate among the various kinds of conversion facilities or energy production methods using eligible materials under the BCAP program.

For these reasons, NAFO supports the proposed rule’s definition of “eligible material” and urges USDA to maintain the definition in the final rule.

C. The Proposed Requirement For Conservation Plans, Forest Stewardship Plans or Equivalent Plans Is Reasonable And Should Remain in the Final Rule

Under the proposed rule, all participants subject to a BCAP contract must implement a conservation plan, a forest stewardship plan or an equivalent plan. See 75 Fed. Reg. at 6286 (proposed 7 C.F.R. §§ 1450.206(a)(4), 1450.207). NAFO believes

the approach in the proposed rule is appropriate and will ensure that forest landowners and operators will maintain environmental integrity in their CHST activities. In particular, NAFO supports USDA's decision to allow program participants to comply with Forest Stewardship Plans or alternative "equivalent plans." *Id.* at 6265. This decision is consistent with the 2008 Farm Bill and will allow program participants reasonable alternatives for incorporating best management practices.

In its proposal, USDA notes that it has received comments that state "a desire to expand the requirement for conservation plans," and requests comments on whether additional requirements should be included in the final rule. *Id.* at 6265, 6269. NAFO does not believe any additional conservation or stewardship measures are necessary in the BCAP program, and recommends against any such amendments. Under the proposed rule, in order to be eligible for matching payments, forest landowners and operators must not only comply with any existing conservation plans or forest stewardship plans, but also must satisfy any other applicable laws. See 75 Fed. Reg. at 6282 (proposed 7 C.F.R. § 1450.3(c)). The existing framework of environmental laws, best management practices and forest practice regulations at the federal, state, and local level provide significant protection and conservation, which has been documented through extensive monitoring. See *supra* at I.D. For these reasons, NAFO supports the proposed rule's provisions related to conservation plans, forest stewardship plans or equivalent plans, and recommends against any attempt to expand the proposed requirement.

D. USDA Should Ensure Fair Treatment Of Applicants In The Existing and Proposed CHST Program.

NAFO believes certain actions are necessary to ensure that all applicants are treated fairly both under the final BCAP rule and in the transition from implementation of the CHST Notice of Funds Availability ("NOFA") to the final BCAP rule.

1. The Final Rule Should Adopt A Uniform Approach To Matching Payments And Program Incentives for Forest-Derived Materials.

NAFO recommends the final rule adopt a uniform approach to matching payments for forest-derived materials. The proposed rule provides several options for matching payments. See 75 Fed. Reg. at 6285 (setting forth three options for proposed 7 C.F.R. § 1450.106). NAFO has reviewed these approaches and recommends that USDA's final rule support a uniform approach to matching payment eligibility for all forest-derived materials rather than differentiating among types of forest biomass or the

conversion facilities utilizing such biomass. Matching payments should be provided for all eligible forest-derived materials at a rate of \$1 for each \$1 per dry ton paid, up to \$45 per ton. Such an approach to matching payments will support development of the forest-derived biomass supply chain in a manner that is not arbitrary and that is proportional to the need. See *supra* Section II. As stated previously, focusing the full potential support of the matching payment on the portion of the supply chain that moves forest-derived materials to conversion facilities, the CHST program can better achieve Congressional intent by focusing the resources of the program on building and growing the infrastructure and jobs needed to develop this part of the supply chain.

Likewise, the BCAP program will better achieve its intended purposes by treating facilities using a variety of technologies and processes to produce renewable energy in a uniform and consistent manner that does not introduce unnecessary or costly complexities. After all, the “purpose of BCAP is to encourage biomass energy production.” 75 Fed. Reg. at 6274; see also 7 U.S.C. § 8111(b)(1)-(2) (purposes of BCAP are supporting “the establishment and production of eligible crops for conversion to bioenergy in selected BCAP project areas” and assisting “agricultural and forest land owners and operators with [CHST] of eligible material for use in a biomass conversion facility.”). In order for the supply chain to develop and mature to produce the desired infrastructure and jobs, it will be necessary to foster a system enabling the supply chain to respond to demand wherever and whenever it may occur. Differentiating among conversion facilities, technologies or energy products will prevent innovation and optimization in the development of the biomass supply chain and may foreclose some of the most important benefits the BCAP program can provide. Rather than adopting requirements for conversion facilities that differentiate among energy types or that require conversion facilities to differentiate internally the kind of renewable energy they produce, a more efficient approach is to treat all renewable energy production consistently and focus the program on building the supply chain that will enable forest-derived biomass to help develop and maintain a biomass-based renewable energy capability over the long term.

The final rule should enable biomass conversion facilities to recoup certain costs associated with participating in the BCAP program. In order for a delivery of eligible materials to a biomass conversion facility to qualify for payment under the CHST program, the receiving biomass conversion facility must be qualified under BCAP. 75 Fed. Reg. at 6267. Under the proposed rule, these facilities would be required to enter a contract with the Commodity Credit Corporation (“CCC”) and administer the program’s requirements. Given the potential costs associated with participation in the program, it

is possible that some biomass conversion facilities may elect not to participate in the program, which could result in fewer available options for the use of forest-derived biomass thereby hindering the development of supply chain infrastructure. To address this concern, NAFO recommends that BCAP offer biomass conversion facilities an appropriate service fee or a participation grant, whichever is more consistent with legislative intent, that would cover the administrative cost of participating in the program. By provision of a specific payment in the rule, eligible material owners can ensure that their customers' added costs can be addressed without concern that a scheme or device is being used.

2. USDA's Administration Of The Existing Program Should Treat Early Actors Fairly.

Many NAFO members have made a good-faith effort to participate in the interim CHST program and should not be penalized for being early actors. The transition to the final rule should ensure that these participants are treated fairly.

All program participants should be entitled to a full two-year participation period. Under the proposed rule, BCAP participation is limited to two years, beginning on the date that the first matching payment is issued. 75 Fed. Reg. at 6266, 6268. As a preliminary matter, NAFO supports USDA's proposal to start the two-year time period immediately after the initial payment instead of after initial approval. *Id.* Beginning matching payment eligibility from the date of issue of the first matching payment is fundamentally fair as it avoids penalizing participants if, through no fault of their own, delivery of eligible material is delayed. *Id.*

All participants, however, must be afforded an opportunity to fully participate in the program for two years. On February 8, 2010, the CCC announced a moratorium on the lines of credit. See 75 Fed. Reg. at 6264 ("[t]his proposed rule terminates the [notice of funds availability]"). Early actors should not be penalized. To the extent that these participants are not able to participate in the program until a final rule is issued, the two-year clock should be tolled until the program has been reinstated. It would be unfair to prevent qualifying participants from using the program fully while continuing to allow the clock to run. Staying the two-year clock would be consistent with Congressional intent; the BCAP statute merely states that USDA may provide matching payments "for a period of 2 years." 7 U.S.C. § 8111(d)((2)(B). Therefore, it is within the agency's discretion not to count the period of time in which no funding is available for matching payments against the two-year time frame. All program participants, whether

they participated in the program under the NOFA or plan to participate after a final rule is issued, should be given a full two years of program eligibility.

Specifically, NAFO requests that the time between February 3, 2010, and the date of the first payment under the final rule be subtracted from the total time for purposes of calculating the two years. Also, we request that the beginning of the two years start at the time of the first payment under the NOFA (rather than on the date of the first AD 245-1 approval) for NOFA participants. We recognize that some deliveries of previously-approved volume have received or will receive matching payments after February 3. However, the agency was not able to make additional approvals after February 3. Therefore, in order to avoid penalizing early actors, any time after February 3 should not be counted against the two year requirement.

NAFO supports FSA's recent notice related to approved wood deliveries and related payment processing. The Farm Service Agency ("FSA") recently issued Notice BCAP-11, available at http://www.fsa.usda.gov/Internet/FSA_Notice/bcap_11.pdf. This Notice confirms that applicants will have a 30-day extension for delivering approved and undelivered material after March 31, 2010. It further confirms that County Offices may continue to issue payments for wood delivered under lines of credit approved before February 3, 2010. NAFO commends the agency for taking these steps, which are critical to ensuring that BCAP program participants are treated even handedly. Many program participants may not have been able to deliver the quantity of wood approved in existing lines of credit by the original deadlines, especially because it has been an extremely wet season and thus it has been difficult to get a normal number of trees out of the forest and to their correct destination. FSA's guidance is thus timely and reasonable.

IV. The Establishment and Annual Payments Should Not Improperly Exclude Certain Private Forest Landowners.

The proposed rule's definition of "eligible land" eliminates certain landowners' ability to receive establishment and annual payments. Because this exclusion is inconsistent with the language of the 2008 Farm Bill, it should be modified in the final BCAP rule.⁴ Specifically, the "eligible land" definition should be amended to allow land

⁴ It is also inconsistent with the NOFA for CHST, which does not exclude publicly traded corporations or entities principally engaged in the production of wood products. See 74 Fed. Reg. 27767, 27769 (June 11, 2009) (including renewable biomass from "[n]on-industrial private forest land where biomass collection and harvesting is done in accordance with a forest stewardship plan, described in section 5 of the Cooperative Forestry Assistance Act of

owned by publicly-traded companies and lands associated with manufacturing to participate in the BCAP program.

Under the proposal, payments would only be available for producers with “eligible land” located within specified project areas that produce eligible crops of renewable biomass. 75 Fed. Reg. at 6270. The proposed regulation, 7 C.F.R. § 1450.204, would define “eligible land” as (1) “agricultural land”; or (2) “nonindustrial private forest lands,” subject to certain exclusions. See *id.* at 6285-86.

The proposed rule defines “Nonindustrial private forest land,” in turn, as “rural lands with existing tree cover, or that are suitable for growing trees, which are owned by any private individual, group, association, corporation, Indian Tribe, or other private legal entity, *consistent with the definitions of nonindustrial private forest land and landowner in 36 CFR 230.2, and the regulations in 36 CFR 230.31.*” 75 Fed. Reg. 6281-82 (emphasis added) (Section 1450.2(b)). The proposed regulation’s reference to these Forest Service regulations is misplaced and should be deleted. The cited regulations’ definitions of nonindustrial forest land and landowner are inconsistent with the direction in the 2008 Farm Bill and, therefore, Congress’s intent for the BCAP program.

Under the 2008 Farm Bill, “[t]he term ‘eligible land’ includes agricultural and nonindustrial private forest lands (*as defined in section 2103a(c) of Title 16*).” 7 U.S.C. § 8111 (emphasis added). In turn, section 2103a(c) defines “nonindustrial private forest lands” as “rural, as determined by the Secretary, lands with existing tree cover, or suitable for growing trees, and owned by any private individual, group, association, corporation, Indian tribe, or other private legal entity.” 16 U.S.C. § 2103a(c). The Secretary has not further modified this statutory definition by regulation.

Thus, the 2008 Farm Bill expressly identifies the statutory definition of “nonindustrial private forest lands” that should be applied in BCAP. Because Congress has spoken directly to this issue, USDA must give effect to Congress’s intent. *Chevron v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”). Because the statutory definition referenced in the 2008 Farm Bill—16 U.S.C. § 2103a(c)—does not

1978 (16 U.S.C. 2103a), another practice plan approved by the State Forester, or a Forest Stewardship Plan developed by the State Forester . . .”).

exclude corporations whose stocks are publically traded or legal entities principally engaged in the production of wood products, it would be contrary to Congressional intent to finalize regulations that include such a restriction. We urge against a final rule that does not allow these landowners' participation in the program, and that would create significant legal uncertainty as to potentially frustrate the implementation of the BCAP program.

In addition to being contrary to Congressional intent, there is no logical reason to exclude lands owned by publicly-traded companies and lands associated with manufacturing. This exclusion would unnecessarily exclude millions of acres of land from the crop assistance portion of the BCAP program that could otherwise make a positive contribution to the program's objectives. As a general matter, NAFO is unaware of any common difference in the size or management of such lands as compared to other nonindustrial private forest lands. The proposed limitation is also inconsistent with the purposes of the BCAP program to support the establishment and production of bioenergy feedstocks in an environmentally sound and sustainable manner. While there may be specific substantive reasons why certain project areas might be eliminated from consideration based on environmental or other attributes of the land, the fact that a corporation's stock is publicly traded or that the entity is principally engaged in the production of wood products has no bearing or relationship on the suitability of such land for the program.

Further, the final rule should delete the reference to the cited Forest Service regulations because those regulations are not implementing 16 U.S.C. § 2103a(c) as referenced in the 2008 Farm Bill. This statute implements Section 5(c) of the Cooperative Forestry Act, as amended, by establishing the Forest Stewardship Program. In contrast, the first cited regulation, 36 C.F.R. § 230.2, relates to the Stewardship Incentive Program, and implements Section 6 of the Cooperative Forestry Assistance Act, as amended.⁵ 16 U.S.C. § 2103b; 36 C.F.R. § 230.1(a). The second regulation, 36 C.F.R. § 230.31, is for the Forestry Land Enhancement Program, established by Section 4 of the Cooperative Forestry Assistance Act, as amended, 16 U.S.C. § 2103. See 36 C.F.R. § 230.30. Notably, *unlike Section 2103a*, Sections 2103b and 2103 restrict the definition of "nonindustrial private forest lands" to lands owned by entities that have "definitive decision-making authority over the lands."

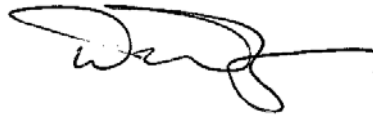
⁵ See Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. 101-624 104, Stat. 3359, 3525-28 (Nov. 28, 1990) (amending the Cooperative Forestry Assistance Act).

Compare 16 U.S.C. § 2103b(a)(2) *and* 16 U.S.C. § 2103(k)(1)(B) *with* 16 U.S.C. § 2103a(c). Because the 2008 Farm Bill expressly refers to 16 U.S.C. § 2103a(c), which is Section 5(c) of the Cooperative Forestry Act, as amended, it would be contrary to the statute on its face for USDA to adopt a more restrictive definition from different sections of that statute (Sections 4 and 6), as it has proposed.

Conclusion

NAFO appreciates the opportunity to comment on this important rulemaking and looks forward to working with USDA to realize the contributions our private forests can make to achieve the goals of the BCAP program.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "David P. Tenny", with a long horizontal flourish extending to the right.

David P. Tenny
President and CEO
National Alliance of Forest Owners